No. 11768

In the United States Circuit Court of Appeals for the Ninth Circuit

TREASURE COMPANY, A CORPORATION, AND SAMARKAND OIL COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from an order of the district court (R. 185) denying appellants' motion (R. 179–182) to vacate a temporary injunction entered on January 27, 1947 (R. 171–178). The district court's jurisdiction to issue the temporary injunction rests upon section 262 of the Judicial Code, 28 U. S. C. sec. 377.

The order appealed from was entered in a condemnation proceeding instituted by the United States. That proceeding was instituted under authority of

section 5d (5) of the Act of January 22, 1932, 47 Stat. 5, as amended March 27, 1942, 56 Stat. 174, 15 U. S. C. sec. 606b (5), and Title II of the Second War Powers Act of March 27, 1942, sec. 201, 56 Stat. 176, 177, 50 U. S. C. sec. 632, as extended by Executive Order 9217, August 7, 1942, 7 F. R. 6177.

The order appealed from was entered on August 4, 1947 (R. 185). Notice of appeal was filed on August 18, 1947 (R. 186). This Court's jurisdiction rests upon section 129 of the Judicial Code, 28 U. S. C. sec. 227.

QUESTIONS PRESENTED

1. Whether a federal district court, having acquired jurisdiction over property by the institution of condemnation proceedings by the United States, has power to enjoin temporarily the prosecution of actions subsequently brought in a state court to recover such property or damages for its withholding.

2. If so, whether the federal court erred in refusing to set aside an order temporarily restraining prosecution of the state court actions pending determination of the condemnation proceeding.

STATUTES INVOLVED

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, so far as material, provides:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 265 of the Judicial Code, 28 U. S. C. sec. 379, provides:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy.

STATEMENT

This is an appeal from an order refusing to set aside an interlocutory injunction which, pending determination of a condemnation proceeding instituted by the United States, restrains appellants from proceeding further in two actions brought by them in the Superior Court of Los Angeles County, California, against the Union Oil Company to recover certain property or damages for its withholding.

The material facts are as follows:

On September 19, 1942, the Reconstruction Finance Corporation, at the request of its subsidiary, the Defense Plant Corporation, requested the Attorney General to institute proceedings to condemn described lands for use as a storage reservoir for natural gas (R. 77–80). On September 28, 1942, the United States filed a complaint to condemn the fee simple title (R. 2–13). An order for immediate possession was entered by Judge Beaumont on the same day (R. 14–19), and the Defense Plant Corporation took possession. It employed Union Oil Company to maintain and operate the property (R. 67).

Later (a question having been raised as to whether certain oil-well equipment was included in the com-

plaint) the Reconstruction Finance Corporation amended the request of September 18, 1942, enumerating and expressly including such equipment. Accordingly, an amended complaint in condemnation was filed on January 12, 1944 (R. 37–46). Being unable to determine at that time whether the property described was real or personal, the Government referred to it in the amended complaint as "personal property and trade fixtures," solely for the purpose of identification (R. 44).

Before the condemnation complaint was amended, and on November 15, 1943, each appellant had filed in the Los Angeles Superior Court a claim and delivery action against Union Oil Company to recover part of the equipment subsequently covered by the amended complaint in condemnation. Defense Plant Corporation intervened and Reconstruction Finance Corporation later was substituted (see R. 135–136). The state court denied motions to abate these actions (R. 155–161), and the Government asked the court below to enjoin their prosecution. The motion was passed upon by Judge McCormick. Relying upon the doctrine of "first in time" in actions in rem, he held that the state court acquired jurisdiction of the res prior to the filing of the amended complaint in condemnation. Accordingly, he refused to enjoin the state actions (R. 52–63). They proceeded to trial and judgment (R. 135–151, and see Br. 8). The court found the property involved, consisting of oil drilling tools and equipment not attached to the land, was personal property (R. 138).

On September 27, 1945, each appellant filed another suit against Union Oil Company in the state court to recover possession of additional property located on the lands condemned or, in lieu of the property, damages for its withholding (R. 71). On March 26, 1946, the Government filed its petition in the court below for an injunction restraining prosecution (R. 66–76). Appellants answered (R. 121–151). After hearing (R. 197–266), the court below (Judge Beaumont) granted the injunction on January 27, 1947.[1]

On May 28, 1947, appellants served notice of motion for an order vacating the injunction (R. 179–182). On August 4, 1947, the court below entered its order refusing to vacate the injunction, and appellants appealed (R. 185, 186).

ARGUMENT

I

The district court has the power to issue the temporary injunction

A. *Section 265 of the Judicial Code does not bar the issuance by federal courts of injunctions restraining state court proceedings in cases where such relief is sought by the United States.*—Section 262 of the

[1] Each appellant also brought an action to recover the value of oil alleged to have been wrongfully extracted by the Union Oil Company (see R. 72–73). Restraint of the prosecution of these actions was also asked (R. 76). At the hearing which resulted in issuance of the restraining order, counsel for appellants agreed that these oil cases related to real property and so would not be tried until determination of the condemnation proceeding (R. 261–262). Because of this agreement, the restraining order did not embrace these actions (R. 173).

Judicial Code, 28 U. S. C. sec. 377 (p. 2, *supra*), clothes federal district courts with "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions." Section 265 of the Judicial Code, 28 U. S. C. sec. 379 (p. 3, *supra*), subsequently enacted, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State." The general powers previously given were obviously limited by section 265. *Toucey* v. *N. Y. Life Ins. Co.,* 314 U. S. 118, 132 (1941).

Appellant argues (Br. 70–72) that the injunction issued in this case falls within the prohibition of section 265. However, statutes of general import, but not naming the United States, will not be construed to restrict or impair the rights of the United States. *Dollar Savings Bank* v. *United States,* 19 Wall. 227 (1873); *United States* v. *Herron,* 20 Wall. 251, 263 (1873); *United States* v. *Amer. Bell Telephone Co.,* 159 U. S. 548 (1895); *United States* v. *Stevenson,* 215 U. S. 190 (1909); *United States* v. *Mine Workers,* 330 U. S. 258 (1947); *United States* v. *Wyoming,* 331 U. S. 440 (1947).

This principle has been uniformly applied in the construction of statutes which, like section 265, in general terms, contract the judicial power of the federal courts. Thus, in *United States* v. *Amer. Bell Telephone Co.,* 159 U. S. 548, 554 (1895), a statute cutting off appeals to the Supreme Court in a certain class of cases was held not to deny to the

United States the right of appeal in such cases. In *United States* v. *Mine Workers,* 330 U. S. 258, 270 (1947), it was held that restrictions imposed by the Clayton Act upon "employers" did not apply to the United States "where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government." In the same case the Court held that section 4 of the Norris-LaGuardia Act, divesting federal courts of jurisdiction to issue injunctions in a specified class of cases (labor disputes) did not operate to divest the court of power to issue such an injunction at the request of the United States. The Court, after noting that the statute was in general terms and did not expressly except the United States, stated (330 U. S. 272) that: "There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." In accord with that rule, it has been held that section 265 does not prohibit the issuance of injunctions to stay state court proceedings where the United States is the petitioner. *United States* v. *Dewar,* 18 F. Supp. 981, 983 (Nev. 1937). Appellants cite no decision holding otherwise.

B. *Even if section 265 of the Judicial Code applied to the United States, it does not deprive the court below of power to issue the injunction here complained of.*—At Br. 43–45 and 70–72, appellants correctly state that section 265 leaves in the federal

courts the power to issue injunctions restraining the prosecution of state court proceedings in situations where both actions are in rem or quasi in rem and the action in the federal court is instituted before the action was filed in the state court. *Princess Lida* v. *Thompson,* 305 U. S. 456, 466 (1939). As Judge McCormick held (R. 57), a condemnation proceeding is in rem, and its commencement places within the jurisdiction of the court the control, actual or potential, of the res. *United States v. Dunnington,* 146 U. S. 338, 352 (1892). Accordingly, at least as early as January 12, 1944, upon the filing of the amended complaint, the court below had within its jurisdiction and control all of the property described therein, including the property on which appellants later instituted their suits in the state court which are here temporarily enjoined. If these state actions are in rem or quasi in rem, then the district court had jurisdiction to enjoin temporarily their prosecution.

In determining the nature of the state court actions the controlling consideration is the nature of the relief asked. *Princess Lida* v. *Thompson,* 305 U. S. 456, 465, 466. While the complaints filed in these actions are not in this record, the Government's petition for injunction alleged (Pars. IX, X, R. 71) that they were "for the possession of the personal property (or its value in damages for withholding)," an allegation admitted by appellants' answer (Pars. IX, X, R. 125–126). Obviously, insofar as the suits seek recovery of possession of specific property, they

are in rem. *Frost* v. *Witter,* 132 Cal. 421, 426, 64 Pac. 705 (1901). The state court would have to have possession and control of the property in order to grant the relief sought by appellants. And since possession and control of the property had been acquired by the federal court below prior to the filing of the state court actions, the jurisdiction of the state court must yield.

Indeed, in declining to enjoin the earlier state actions (R. 53–63) Judge McCormick, applying the principle here contended for by the Government, held (R. 56–57) that these actions were in rem or quasi in rem. He pointed out (R. 57–58) that a money claim for the value of property which is sued for but which defendant may fail to return is quasi in rem. *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105, 116 (C. C. A. 2, 1943); *Lee* v. *Silva,* 197 Cal. 364, 240 Pac. 1015 (1925). But, because the state actions were commenced before the amended complaint in condemnation was filed Judge McCormick held the state court had first acquired jurisdiction.

Except for the specific property which appellants seek to recover, the state court actions here enjoined are indistinguishable from those which Judge McCormick would not enjoin. All therefore are in rem or quasi in rem. In the case at bar, however, the state court actions were filed *after* the federal court acquired jurisdiction. Accordingly, the federal court was not prohibited by section 265 of the Judicial Code from enjoining these actions if such injunctions were necessary to protect its jurisdiction.

II

The district court rightly refused to vacate the temporary injunction

Except where some rule of law governs, the action taken by a trial court upon an application for injunction pending suit rests in its sound discretion and will be disturbed on appeal only when there has been an abuse of discretion. See e. g., *Meccano, Ltd.* v. *John Wanamaker,* 253 U. S. 136, 141 (1920); *Alabama* v. *United States,* 279 U. S. 229, 231 (1929). Obviously, the same considerations govern on review of an order refusing to vacate such an injunction.

Appellants' attack on the temporary injunction is premised on the assumption (see e. g., Br. 23–25) that the property claimed in the enjoined state actions is personal property and hence (so appellants say) not covered by the original complaint in condemnation filed September 28, 1942, and therefore their property was not condemned until the amended complaint was filed on January 12, 1944. If it were *clear* that the property in question was not condemned in 1942, there might be basis for vacating the injunction. *Nisonoff* v. *Irving Trust Co.,* 68 F. 2d 32, 33 (C. C. A. 2, 1933). But the character of this property—whether it is real or personal—is much in dispute, was not determined by the trial court, and on the record here cannot be determined by this Court.

Thus, in the hearing upon the application for the injunction (R. 197–266) the Government made plain that, contrary to appellants' present assumption, it had always taken the position that the property was

part of the realty taken on September 28, 1942 (see R. 206–209, 239–240, 254–255). It was because of the Government's contention and of the impossibility of then determining the question it raised that the trial court issued the order temporarily restraining the state suits (see R. 262). Since the trial court did not have before it the facts necessary for solution of the problem, it is obvious that the record on appeal is equally barren.[2] It results that the temporary injunction should stand until the question can be determined.

Indeed, it is difficult to imagine a plainer case for an injunction pendente lite. Its issuance has not prejudiced appellants. But had it been withheld, the rights of the United States could have been seriously impaired.

As to appellants: The question of whether the property claimed by them was included in the condemnation complaint filed September 28, 1942, in the federal court can be determined only by that court. If it so holds, then appellants have no cause of action against the Union Oil Company and, of course, cannot maintain the suits now temporarily enjoined. If, on the other hand, the federal court finds the property

[2] Much equipment used in the production of oil is part of the real estate of California. *Big Sespe Oil Co.* v. *Cochran*, 276 Fed. 216 (C. C. A. 9, 1921); *Cortelyou* v. *Baker*, 182 Cal. 168, 187 Pac. 417 (1920). But the character of the property involved in this proceeding cannot be determined by examining such decisions. Whether or not property is so affixed to the land as to become part of it is a question of fact to be determined upon the evidence in the particular case. *People* v. *Church*, 57 Cal. App. 2d 1032, 1037–1038, 136 P. 2d 139 (1943).

was not taken in 1942 appellants will be free to prosecute the suits—and to recover the value of the property plus damages for its withholding. Thus, it is plain appellants have not been hurt by issuance of the temporary injunction.

But, as to the United States: If the injunction had not been entered—or if it had been vacated—appellants could have prosecuted their suits in the state court *before* the federal court was able to determine the date of taking. And, as in the federal court, the determinative issue would have been whether the United States condemned the property in 1942. This would have depended upon a construction of the Government's original complaint. Conceivably the complaint could have been construed contrary to the contention of its framer and, in that event, defendant Union Oil Company would have been compelled under California law to account for a tortious taking: value of the property from September 28, 1942, plus damages for loss of use from that date to January 12, 1944.[3] The United States would have been obliged to satisfy the judgment (R. 75, 231).

Thus, with the conclusion of the state trial and the entry of judgment for appellants, one item of the condemnation proceedings would have in fact terminated. Faced with these consequences, the United States would have been compelled to go into the state court and to litigate there an issue it had earlier

[3] Appellants believe that in the state courts they would recover more than just compensation. Their counsel told the court below that "we could recover a larger judgment * * * in the State court" (R. 236).

initiated in the federal court. In effect, it would have been forced to try this part of the condemnation proceedings in the state court.

When regard is had to the facts that appellants have not been hurt by the temporary injunction and that the United States should not be ousted from the tribunal which the law permits it to enter, it is manifest that the order of the district court should not be reversed.

CONCLUSION

Therefore, it is submitted that the order should be affirmed.

Respectfully,

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